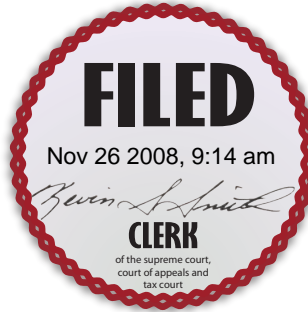


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TRICIA M. PINGILLEY,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 18A02-0805-CR-418

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Cause No.18C02-0704-FC-25

November 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Tricia Pingilley appeals her sentence, which the trial court imposed in her absence, following her guilty plea to one count of forgery, a Class C felony. Pingilley raises two issues, which we restate as: 1) whether the trial court erred when it sentenced Pingilley in her absence; and 2) whether the trial court erred when it sentenced Pingilley to the advisory sentence of four years for a Class C felony. Concluding that Pingilley knowingly and voluntarily waived her right to be present at sentencing and that she expressly waived her right to appeal her sentence as a condition of her plea agreement, we affirm.

Facts and Procedural History

On April 21, 2007, Pingilley and her niece, Amanda Szenko, cashed counterfeit payroll checks at Meijer stores in Ohio and Indiana using falsified identification. Police apprehended Pingilley and Szenko in a Meijer store in Indiana. On April 30, 2007, the State charged Pingilley with one count of forgery, a Class C felony.

On May 31, 2007, Pingilley appeared before the trial court for her initial hearing, at which the trial court set the dates for her pre-trial conference and jury trial. Subsequently, Pingilley failed to appear on November 1, 2007, for her pre-trial conference, on November 8, 2007, for a status conference, and on November 26, 2007, for her jury trial. The trial court reset her jury trial for February 11, 2008. However, on January 10, 2008, Pingilley entered into a plea agreement with the State. Pursuant to the plea agreement, Pingilley agreed to plead guilty in exchange for a four-year cap on her sentence. The plea agreement otherwise left sentencing to the discretion of the trial court.

As a condition of her plea agreement, Pingilley waived her right to “appeal the sentence in this case, if the Judge imposes a sentence that is consistent with the terms of this Plea Agreement.” Appellant’s Appendix at 41. The trial court held a change of plea hearing on February 11, 2008, at which Pingilley appeared. At the hearing, the trial court questioned Pingilley regarding her understanding and acceptance of the plea agreement and specifically about the waiver of her trial rights, sentencing rights, and her right to appeal the judgment. At the conclusion of the hearing, the trial court took Pingilley’s guilty plea and the plea agreement under advisement and scheduled a sentencing hearing for April 24, 2008, at 9:00 a.m.

On April 24, 2008, Pingilley failed to appear for her 9:00 a.m. sentencing hearing. Conflicting evidence in the record indicates that either Pingilley or some other person contacted the trial court and defense counsel to explain that Pingilley had experienced automobile trouble. Pingilley did not leave any contact information with either the trial court or with her defense counsel. The trial court continued the hearing until 1:30 p.m. the same day. At 1:30 p.m., Pingilley again failed to appear. Between the two hearings, Gregory Hinds, apparently a friend of Pingilley, contacted defense counsel to inform him that Pingilley continued to experience automobile trouble and could not get to the court house. Defense counsel could not confirm that he had ever actually spoken to Pingilley nor could he confirm the authenticity of her reason for failing to appear. Therefore, the trial court proceeded with sentencing in Pingilley’s absence.

After hearing arguments from defense counsel, the prosecutor, and the probation officer, the trial court sentenced Pingilley to four years. The trial court also issued a

warrant for Pingilley's arrest directing that she be transported directly to the Department of Correction. Pingilley now appeals.

Discussion and Decision

I. Sentencing in Pingilley's absence

Pingilley first argues that the trial court erred when it sentenced her in her absence. "The defendant must be personally present at the time sentencing is pronounced. If the defendant is not personally present when sentence is pronounced, the court may issue a warrant for his arrest." Ind. Code § 35-38-1-4(a). We recognize that this statute may be construed as requiring the personal presence of a defendant as a prerequisite to sentencing. However, such an interpretation would produce an absurd result, in effect allowing a criminal defendant to bind the hands of the trial court by voluntarily absenting herself from the sentencing hearing. More logically, the statute protects the right of the defendant to be present at sentencing from interference, a right which she may waive by her own voluntary absence. Supporting this interpretation, our supreme court has previously held that a trial court may properly sentence a criminal defendant in her absence. See James v. State, 541 N.E.2d 264, 264 (Ind. 1989).

A trial court may sentence a criminal defendant in her absence if it finds that her absence is knowing and voluntary. Gillespie v. State, 634 N.E.2d 862, 863 (Ind. Ct. App. 1994), trans. denied. The best evidence of a defendant's knowledge is the defendant's presence in court on the day the sentencing is scheduled. Cleff v. State, 565 N.E.2d 1089, 1090 (Ind. Ct. App. 1991), trans. denied. The trial court has discretion to

determine whether or not a criminal defendant should be sentenced in her absence. Id. at 1091.

Pingilley appeared before the trial court for her change of plea hearing at which the trial court set the date of the sentencing hearing. Subsequently, Pingilley failed to appear for her sentencing hearing. Although Pingilley contacted the trial court and her counsel with an excuse for her failure to appear, neither the trial court nor defense counsel was able to confirm the excuse. Prior to the sentencing hearing, Pingilley had failed to appear for a pre-trial conference, a status conference, and, most importantly, for her scheduled jury trial. After failing to appear for her sentencing hearing, Pingilley made no attempt to provide the trial court with evidence establishing that she indeed experienced automobile trouble that prevented her from attending the sentencing hearing. In light of these facts, it was reasonable for the trial court to refuse to believe Pingilley's excuse and find that she had knowingly and voluntarily waived her right to be present at her sentencing. Therefore, the trial court did not err when it sentenced Pingilley in her absence.¹

II. Length of Sentence

Pingilley next argues that the trial court erred when it sentenced her to four years, the advisory sentence for a Class C felony. As a condition of her plea agreement, Pingilley waived her right to appeal her sentence so long as the judge imposed a sentence

¹ Citing this court's decision in Walton v. State, 454 N.E.2d 443 (Ind. Ct. App. 1983), Pingilley also argues that the trial court did not afford her an opportunity to testify directly about her absence from the sentencing hearing. However, Pingilley misreads Walton as requiring the court to conduct a sua sponte inquiry into a defendant's absence from trial or sentencing. See Walton 454 N.E.2d at 444 (disagreeing with Walton's assertion that a sua sponte inquiry is required). While the trial court cannot prevent a defendant from offering an explanation for her absence, it need not conduct a sua sponte inquiry. Holtz v. State, 858 N.E.2d 1059, 1062-63 (Ind. Ct. App. 2006). Pingilley never made any attempt, after her sentencing, to provide the trial court with an explanation for her absence; and trial court had no duty to seek out such an explanation.

consistent with the terms of the plea agreement. Our supreme court recently held that a defendant may waive the right to appellate review of her sentence as part of a written plea agreement. Creech v. State, 887 N.E.2d 73, 75 (Ind. 2008). The trial court specifically asked Pingilley whether she fully understood and accepted the terms of her plea agreement, including her waiver of trial, sentencing, and appeal rights, and Pingilley responded in the affirmative. The trial court sentenced Pingilley to four years, which is not only the advisory sentence for her offense but also is within the sentence cap imposed by the plea agreement. Therefore, Pingilley waived this issue for appeal.

Conclusion

Pingilley knowingly and voluntarily waived her right to be present at sentencing. As a result, the trial court did not err when it sentenced her in her absence. In addition, Pingilley expressly waived her right to appeal her sentence as a condition of her plea agreement.

Affirmed.

NAJAM, J., and MAY, J., concur.